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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1176

EXXON CORPORATION AND
KERR-MCGEE CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION, ET AL.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

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The Government's brief in opposition to the petition for certiorari undertakes to belittle petitioners' claims as being allegedly misstated and invalid on the merits. As demonstrated below, however, those criti-

cisms are fundamentally misleading, and they also fail to address the question whether the case deserves certiorari review. Significantly, the Government's brief does not even attempt to deny that the court below decided an important Constitutional issue which will directly affect, on a recurring basis, the fundamental rights of every citizen about whom a Federal agency has gathered confidential information.

I.

THE DECISION BELOW POSES A REAL AND CONTINUING THREAT TO THE INTERESTS OF ALL THOSE CITIZENS AND FIRMS (INCLUDING PETITIONERS) AS TO WHOM FEDERAL AGENCIES POSSESS CONFIDENTIAL INFORMATION

The Government's "Argument" starts out by asserting in effect that in three respects we have seriously mischaracterized the case and that, although at least five members of the Court of Appeals below evidently thought they were addressing the question stated in the petition for certiorari, in fact that question is not really presented on this record (Br. at 6-7). In fact the first two criticisms are entirely superficial,[1] and the third falls apart upon analysis.

[1] The Government's first two points come down to a play on words. It is said that when the petitioners turned over large quantities of confidential business data to the FTC under a subpoena duces tecum, they were not really "compelled" to do so because they could have withheld the information temporarily and awaited an enforcement proceeding against them (Br. at 6 and n.6). This is akin to saying that when a police officer orders a motorist to move his vehicle in a particular way, no "compulsion" is involved because the motorist has the right to disobey and await the consequences. Secondly, the Government insists that the case does not broadly involve differing kinds of requests for information from the Congress; it asserts that only "official requests" of Congressional committees are involved (*id.* at 7). But a major plank in the procedural contentions being advanced by the petitioners is that the courts should have an opportunity to decide whether a specific request from someone connected with the Congress is or is not an "official request" of a Congressional committee.

The reasoning underlying the third criticism (as set forth at Br. 6-8) runs essentially as follows: (1) that when petitioners were considering whether or not to comply with the subpoena duces tecum which had been served upon them by the Federal Trade Commission, the Commission made a commitment to petitioners that "the Commission would give them reasonable notice" before disclosing any of petitioners' trade secrets to anyone, including Congress[2]; (2) that the petitioners then "voluntarily" made certain trade secrets available to the Commission in reliance upon that "commitment" (*id.* at 6, 7); (3) that the FTC lived up to its commitment in this case and thus avoided doing any damage to petitioners' property rights (*id.* at 7); (4) that "there is no reason to suppose the Commission will not continue to abide by its commitment" in the future (*id.* at 8); (5) that in the absence of any such "reason" there is now no threat to petitioners' interests; and (6) that in the absence of any such threat "there is no basis for granting petitioners" either injunctive or declaratory relief. In short, the Government suggests that these petitioners have never had a claim upon which relief could be granted.

The foregoing reasoning might have some plausibility if the "commitment" to which the Government's brief so frequently refers were anything like

[2] The quoted language appears in the Government's "Question Presented" at Br. 2.

the Government's description. The undisputed facts, however, show that no "commitment" of that kind ever existed.

The facts are that when petitioners obeyed the FTC subpoena and delivered their trade secrets to the agency, they *thought* they had obtained some meaningful commitment as to advance notice; in the words of the Government's brief, petitioners at that time were proceeding "on the understanding that the Commission would give them reasonable notice" (*id.* at 2) before any proposed disclosure of their trade secrets (in other words, that *some* degree of advance notice would be given, no matter what the circumstances).[3] It had not yet become clear to petitioners (as it later did) that the Commission might be reserving the right to make disclosure of petitioners' trade secrets without giving them any advance notice at all.

The truth began to emerge on May 10, 1976, when the FTC affirmatively threatened to make disclosure of petitioners' trade secrets within 23 hours. It is true that by proceeding on a crash basis, and aided by a little luck, petitioners managed to get to court and obtain temporary relief within the 23 hours allowed them, but as a result of that hectic experience it then began to occur to petitioners' counsel that the FTC's so-called commitment to give them "reasonable notice" before any disclosure might be less than it seemed.[4]

[3] The Government's own brief recognizes that this was petitioners' understanding, not only in the language quoted in the text but also in the statement (at 6) that petitioners were operating "on the understanding that the Commission would provide [petitioners] with prior notice of any disclosure to Congress." In other words, by the Government's own admission, the FTC led the petitioners to believe that any disclosure to Congress would be preceded by *some* amount of advance notice.

Those suspicions were soon borne out. In the ensuing litigation the Commission frankly stated (1) that it regards any informational request from a Congressional committee as binding upon the Commission in accordance with its terms[5] and (2) that if the FTC receives a request which purports to have been authorized by a Congressional committee and which requests *immediate* disclosure of trade secrets, the request will be honored immediately—without any effective prior notice to the owners and without affording them any real opportunity to obtain judicial review of the propriety of (or the authority underlying) the request. In other words, after petitioners had turned over their trade secrets to the FTC, they became aware (in the words of the opinion below) that the FTC intended "to hold open the option of disclosing [petitioner's] trade secrets in the future without

[4] The Government's brief flatly asserts that by providing petitioners with 23 hours' advance notice on May 10, 1976, the FTC "satisfied" its "commitment" to give petitioners "as much notice as reasonably possible" (Br. at 7). Although petitioners have repeatedly called upon the FTC to explain why it could not have provided petitioners with a few days' notice, rather than only a few hours, the FTC has never done so. Since it is undisputed that the Congressional request which prompted the notice was *not* a compulsory subpoena, it is petitioners' position that the FTC could and should have given more notice and that in fact the FTC violated its alleged "commitment" to give "as much notice as reasonably possible." Nevertheless, as explained elsewhere, it is also petitioners' position that the FTC's claim that it is entitled to disclose petitioners' trade secrets in the future without *any* advance notice entitles petitioners to equitable relief now, without regard to whether the FTC violated its "commitment" in the past.

[5] In the words of the court of appeals the FTC "treats such congressional requests as compulsive" (App. 7a).

the [advance notice] safeguards" to which petitioners believe themselves entitled (App. 9a, n.10).

Against that background, we submit, it is highly misleading for the Government now to suggest that this Court should not consider petitioners' future rights because the FTC has long since made "a commitment" which protects them. In fact, with respect to disclosures to Congressional personnel the FTC (as it turns out) has never made *any* advance-notice commitment of any kind; on the contrary, to this day it continues to reserve the right to make disclosure to Congressional personnel without any advance notice if the agency considers that course appropriate. It is precisely this reservation of right, and the continuing threat which the reservation poses for petitioners' trade secrets, that has prompted petitioners to seek declaratory and injunctive relief and to seek certiorari review now.[6]

Nor is the Government's position aided by its suggestion that, if the FTC were to disclose petitioners' trade secrets pursuant to an authorized request from a Congressional committee, such disclosure would "not in itself injure petitioners" because such disclosure "does not constitute public disclosure" (Br. at 10). Obviously that suggestion begs the question. A request from someone on Capitol Hill may be regarded

[6] Since the FTC is now under no "commitment" to give petitioners any amount of advance notice of a future disclosure of their trade secrets to Congress, it is really disingenuous for the Government's brief to assert (as it does at p. 8) that "there is no reason to suppose the Commission will not continue to abide by its commitment to give petitioners either 10 days' notice or as much notice as can reasonably be given." Since the latter phrase ("as much notice as can reasonably be given") can mean no notice at all, the alleged "commitment" is simply a fiction.

by the FTC as a proper request and therefore non-injurious, but the FTC's view may in fact be incorrect. The whole point is that the petitioners should be given advance notice so as to enable them to get to court and let the judge decide whether the proposed disclosure is unlawfully injurious or not.

In a very real sense the Government here is trying to eat its cake and have it too. It argues in effect that if in a given situation the FTC chooses to give a private party enough advance notice of a proposed disclosure to allow him to get to court (as petitioners did), then that party has not been injured and has no right to a judicial declaration as to how much (if any) notice must be required in the future—and, conversely, if the FTC decides to give less than adequate notice, so that an actual disclosure occurs before judicial intervention is possible, the entire controversy is moot, and a declaratory judgment is therefore improper in that situation as well. The Government simply does not want this Court to authoritatively resolve the simple but serious Constitutional issue raised in the petition for certiorari.

II

THE DECISION BELOW IS INCONSISTENT WITH THE TEACHINGS OF PRIOR DECISIONS OF THIS COURT, INCLUDING CHRYSLER V. BROWN DECIDED APRIL 18, 1979

The second portion of the Government's brief purports to demonstrate that the decision below does not conflict with any decision of this Court or of any other court of appeals.

The Government first attempts to deal with *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), in which the Court discussed two different situations, (1) where a Congressional subpoena seeks confidential information directly from its owner, and (2) where the same information is in the hands of a third party and the Congressional subpoena is directed to him instead of the owner:

> "In the former case the [owner] can resist and thereby test the subpoena; in the latter case, however, unless a court may inquire to determine whether a legitimate legislative purpose is present . . . compliance by the third party could frustrate judicial inquiry." 421 U.S. at 501, n.14 (citations omitted).

In the petition for certiorari we urged that the latter statement constitutes a clear affirmation of the owner's right to a "judicial inquiry" as to the validity of such an informational demand to a third party (Pet. at 12), and we also emphasized that our reading of the Court's language had been unanimously endorsed by all of the judges of the court below who had focused on the point—*i.e.*, two judges in the present case (Bazelon and Wilkey, JJ.[7]) and three in *United States* v. *American Tel. & Tel. Co.*, 185 U.S. App. D.C. 254, 262, 567 F.2d 121, 129 (D.C. Cir. 1977).[8] The Govern-

[7] Pet. at 8, 12, n.11.

[8] The Government's brief suggests (at 9, n.8) that in relying upon *American Tel. & Tel. Co., supra*, we were merely making reference to an intra-circuit conflict which need not be resolved by this Court (Br. at 11, n.11). The suggestion misses the dual point that the case demonstrates (1) that our reading of this Court's language seems justified and (2) that the rule adopted below poses a serious threat to the interests not only of petitioners but also of the Federal Government itself (Pet. at 18).

ment has employed some ingenuity in trying to derive a different meaning from the quoted *Eastland* language, but the suggestion seems inconsistent with the natural meaning.[9] It is the petitioners' position, of course, that, if the owner of confidential information has a right to judicial review of a request which seeks that information from a third party, the owner must be given the pre-disclosure notice needed to allow him to exercise that right.[10]

Thereafter the Government's brief admits the obvious proposition that there are numerous "cases holding that in some circumstances due process requires notice and an opportunity to be heard before a person can be can be deprived of property" (Br. at 10), but the brief seeks to distinguish those cases on two grounds. The first theory seems to be that, if the FTC discloses trade secret information pursuant to a *valid* Congressional request, no unlawful deprivation

[9] The suggestion is that the second proposition set forth in the quoted language (after the semicolon) simply "recounts the view of the court of appeals" in the *Eastland* case without endorsing that view.

[10] United States v. Miller, 425 U.S. 435 (1976), as cited in the Government's brief (at 9, n.9), is not to the contrary. There the Court held that, where a person has voluntarily deposited funds in a bank, the bank's records relating to the deposit are not "private papers" of the depositor, *id.* at 440, whereas it is undisputed in this case that the information which the FTC subpoenaed from the petitioners included trade secrets (*i.e.*, private property) belonging to the petitioners. The lack of dispute on the latter point was specifically noted in the opinion below (App. at 6a).

of property is involved (Br. at 10). That suggestion, however, ignores the situation where the request is *invalid.* It is precisely because a request from Capitol Hill may be either valid or invalid that "due process requires notice and an opportunity to be heard."[11]

Secondly, the Government suggests that because on one occasion in the past (*i.e.*, on May 10-11, 1976) these petitioners were in fact given barely enough advance notice of a proposed disclosure to get to court, they have no right now to complain of the fact that the FTC, which is still in possession of petitioners' trade secrets, is still reserving the right to disclose those trade secrets in the future without any prior notice to petitioners (Br. at 10). But this is equivalent to saying, "Since we did not quite injure you in the past, you have no right now to complain of the fact that we are reserving the right to injure you in the future." Threats of the latter kind are exactly what injunctive and declaratory orders are designed to cure.

On a similar theme the Government's brief then suggests that, even though the FTC *is* reserving the

[11] Oddly the Government's brief cites FTC v. Anderson, 442 F.Supp. 1118, 1124 n.5 (D.D.C. 1977), appeal pending, Nos. 78-1032, 78-1048 (D.C. Cir.), in support of the proposition that disclosure of trade secrets by the FTC to Congress does not amount to a deprivation of property (Br. at 10, n.10). But the court in that case explicitly *assumed* that the FTC would give the owner of the confidential information notice "when the release of particular documents is imminent," 442 F. Supp. at 1124, and held only that, since the owner could raise his deprivation-of-property claim "when such disclosure is imminent" (*i.e.*, when he received his advance notice), it would be "premature" to raise the claim prior thereto. 442 F. Supp. at 1124, n.5. Here the FTC has refused to guarantee that petitioners will receive the advance notice needed to bring a "mature" property claim to court.

right to injure these petitioners in the future (by making disclosure of their trade secrets without advance notice), petitioners' claim that they are entitled to judicial condemnation of the FTC's position presents only an "abstract" issue which should not be considered by this Court (Br. at 10-11). We simply do not understand the point. The opinion below in effect informs all Federal agencies which are in possession of confidential information relating to private citizens and firms that any such agency has the power, if it wishes to use it, to disclose such information without advance notice to the affected party. Obviously that power poses not an "abstract" question but a real and continuing threat not only to petitioners' property rights but also to the rights of all citizens about whom any Federal agency possesses confidential information. That real and continuing threat can be laid to rest only by a grant of certiorari in this case.

Finally, all of the Government's efforts to portray the decision below as good law (*i.e.*, as not inconsistent with the decisions of this Court and of other circuits) have been completely overshadowed by a decision which was rendered by this Court the very day the Government filed its brief in this case—namely, *Chrysler Corp.* v. *Brown*, 47 U.S.L.W. 4434 (April 18, 1979). The latter decision is significant here not only because the decision below is inconsistent with its teaching but also because *Chrysler* so clearly announced a principle which will, in practical terms at least, be virtually emasculated if the decision below is allowed to stand.

In *Chrysler* the Government itself conceded—and this Court agreed with the concession—that where a Federal agency decides to disclose confidential com-

mercial information to persons outside the agency, the owner of the information has an affirmative right to judicial review of that decision in advance of the proposed disclosure in order to allow the Federal judiciary to decide whether such disclosure will or will not be "in accordance with law." *Id.* at 4444. If certiorari were now denied in this case and the decision below were treated as good law, the net result would be that any Federal agency could shut off the *Chrysler* right to judicial review whenever the agency felt, for example, that the need for disclosure was too urgent to allow time for such review to take place—a result which can only be described as ludicrous.[12] If *Chyrsler* really is the law, the opinion below cannot be, and certiorari should now be granted to allow the formulation of a proper advance-notice principle to accompany and preserve the *Chrysler* principle of judicial review.

[12] Understandably the lower Federal courts, in reliance upon the decision below, are now consistently holding that a party whose confidential information is in the hands of a Federal agency is *not* entitled to "a mandatory notice period prior to any disclosure by the [agency] to Congress." Federal Trade Commission v. E.I. duPont de Nemours & Company, Misc. No. 78-0318 (D.D.C.) ("Memorandum Opinion and Order" dated January 10, 1979, at 4); see also Federal Trade Commission v. Owens-Corning Fiberglas Corporation, et al., Misc. No. 78-0313 (D.D.C.)(Order dated January 31, 1979).

CONCLUSION

The petition for certiorari should be granted in order to allow the Court to resolve a simple but vitally important and recurring question of law.

Respectfully submitted,

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